

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF)	
APPLICATION FOR PERMIT)	ORDER GRANTING
NO. 74-16187 IN THE NAME OF)	PETITIONS, IN PART
<u>KURT W. BIRD OR JANET E. BIRD</u>)	

On January 9, 2020, the hearing officer for the Department issued a *Preliminary Order Approving Application* (“Preliminary Order”). On January 23, 2020, Applicants Kurt and Janet Bird (“Bird”) filed *Applicant’s Petition for Reconsideration* (“Bird Petition”). Also on January 23, 2020, Protestants Idaho Department of Fish & Game (“IDFG”) and Idaho Water Resource Board (“IWRB”) (collectively “Agencies”) filed *IWRB’s & IDFG’s Joint Petition for Clarification or in the Alternative Reconsideration* (“Agencies’ Petition”). Both of the petitions were timely filed pursuant to Rule 730.02.a of the Department’s Rules of Procedure (IDAPA 37.01.01). On January 31, 2020, the Agencies filed *IWRB’s & IDFG’s Joint Response to Applicant’s Petition for Reconsideration* (“Agencies’ Response”). The Department’s Rules of Procedure (IDAPA 37.01.01) do not authorize responses to petitions for reconsideration. Therefore, the *Agencies’ Response* will not be considered.¹

Bird Petition

The *Preliminary Order* included a comprehensive analysis of the local public interest factors associated with Application 74-16187. Ultimately, the hearing officer concluded that the application could be approved if conditions were adopted to protect important local public interest factors. The *Bird Petition* proposes to remove or significantly alter the conditions intended to address local public interests. If the local public interest conditions were removed or significantly changed, however, the application for permit would have to be denied. It is apparent that the *Preliminary Order* did not adequately describe the hearing officer’s weighing of the local public interests and the necessity of the local public interest conditions. The *Preliminary Order* should be amended to better describe the relative importance of the local public interest factors identified in the administrative record and the necessity of the local public interest conditions.

North Snake Case

The *Bird Petition* contains a detailed review of a recent decision from the Idaho Supreme Court, *N. Snake Ground Water Dist. v. Idaho Dep’t of Water Resources*, 160 Idaho 518, 376 P.3d 722 (2016) (“North Snake”). Bird admonishes the hearing officer that *North Snake* and the

¹ On February 4, 2020, Bird filed a *Motion to Strike IWRB’s & IDFG’s Response to Applicant’s Petition for Reconsideration and Memorandum in Support*. Because the Agencies’ Response was not considered by the hearing officer and an *Amended Preliminary Order* is being issued in the pending contested case, initiating new deadlines for petitions and appeals, Bird’s motion to strike is moot and will not be addressed in a separate order.

underlying District Court decision are “binding legal precedent” and asserts that the hearing officer must “amend the *Preliminary Order* in accordance with the principles of this case, or at a minimum, explain any basis for not following the precedent contained in these decisions.” *Bird Petition* at 10.

North Snake originated as a contested application for permit before the Department. The hearing officer for the pending contested case also served as the hearing officer for the Department in the *North Snake* case. The Director issued a *Final Order* in the *North Snake* case on February 6, 2015, denying the application because, among other things, the application was not in the local public interest. The local public interest review by the Director was fairly short:

Approval of the Districts' Application would establish an unacceptable precedent in other delivery call proceedings that are or may be pending. In the Rangen Delivery Call, the Director determined that certain ground water users were causing material injury to Rangen by reducing flows from the Curren Tunnel and that junior-priority water rights would be curtailed if mitigation was not provided to Rangen. The Districts' originally proposed assigning the Permit to Rangen as part of IGWA's first mitigation plan. See *Amended Final Order Approving in Part and Rejecting in Part IGWA's Mitigation Plan; Order Lifting Stay Issued February 21, 2014; Amended Curtailment Order*. The Director noted at that time "IGWA's water right application could be characterized as a preemptive strike against Rangen to establish a prospective priority date earlier than any later prospective priority date borne by a Rangen application." *Id.* While a race to file an application to appropriate water does not itself establish that the Districts' Application is not in the local public interest, the Districts' Application attempts to establish a means to satisfy the required mitigation obligation by delivering water to Rangen that Rangen has been using for fifty years. The Districts' Application is the epitome of a mitigation shell game. The Districts' Application brings no new water to the already diminished flows of the Curren Tunnel or headwaters of Billingsley Creek. It is not in the local public interest to approve such an application.

In addition, in this instance, it is inconsistent with the local public interest and inappropriate for the Districts to exercise their power of eminent domain as a vehicle to obtain a water right for mitigation wholly located on land owned by Rangen and to dictate how mitigation water is delivered wholly within Rangen's facility.

Final Order, Application 36-16976 (Feb 6, 2015).

The *Final Order* was appealed to District Court and eventually to the Idaho Supreme Court. The District Court (Judge Eric Wildman) rejected the Director's local public interest analysis. Judge Wildman held that the local public interest review cannot be used to establish winners and losers under the prior appropriation doctrine or to address fairness issues associated with competing filings. The Idaho Supreme Court affirmed the District Court decision, noting that the Director's interpretation of local public interest was “inconsistent with the plain language of the statutory definition provided in Idaho Code § 42-202B.” *North Snake*, 160 Idaho at 525, 376 P.3d at 729 (2016). “Because the Director exceeded his authority by evaluating local public

interest based on factors not contemplated in the statutory definition, the district court did not err in setting aside the Director's conclusion." *Id.*

Bird asks the hearing officer to apply the *North Snake* decisions to the facts of the pending contested case and argues that *North Snake* limits the hearing officer's authority to impose local public interest conditions on the proposed permit. The connection between the *North Snake* case and the pending contested case is tenuous. The facts established in the *North Snake* case and the local public interest factors addressed in the overturned *Final Order* for Application 36-16976 are very dissimilar to the facts presented and local public interest factors raised in the pending contested case. The hearing officer is familiar with the *North Snake* case and does not find the *North Snake* decisions helpful in addressing the issues raised in the pending contested case.

The pending contested case differs from *North Snake* in two important ways. First, in *North Snake*, the protestant to Application 36-16976, Rangen Inc., had a competing application for permit on the same water source, filed later in time than the application filed by North Snake Ground Water District and other districts. To strengthen their purported connection to *North Snake*, Bird contends that the Agencies have an "implied" competing application in this case because the Agencies introduced evidence about using unappropriated water in Big Timber Creek for fish habitat. Bird's arguments about an implied application and an implied water right are not convincing because they hinge on the Agencies' participation as protestants. If the Agencies were to withdraw from the pending contested case, Bird's assertion of implied water rights becomes illogical. Unlike *North Snake*, in this case there are no competing applications on the same water source filed by any of the protestants.

Second, the *North Snake* District Court held that the Director's local public interest review included factors (timing of water right filings, eminent domain, fairness) that are clearly outside of the definition of the term "local public interest" set forth in Idaho Code § 42-202B. The local public interest analysis and conclusions in the *Preliminary Order* do not include any of the factors rejected in the *North Snake* decisions. In fact, the local public interest analysis contained in the *Preliminary Order* and the associated conditions address topics (fish habitat, fish passage) that fall squarely within the definition of local public interest.

Constitutional and Statutory Challenges to Local Public Interest Conditions

One of the central themes in the *Bird Petition* is that the hearing officer, by imposing permit conditions requiring bypass flows to protect fish passage and fish habitat, granted the Agencies an implied minimum stream flow water right. Bird's arguments about implied water rights rely on the Agencies participation as a protestant in the pending contested case. The Agencies participation as protestants is superfluous to the local public interest analysis. The hearing officer could have (and likely would have) imposed similar local public interest conditions on the proposed permit, even if the Agencies were not involved in the pending contested case. The Department was already aware of the USBR Study, which forms the basis for the flow rates included in the disputed conditions. The USBR Study was the basis for the local public interest conditions added to the Whittaker water right, the most-recent irrigation permit issued on Big Timber Creek.

Bird's arguments about implied water rights granted to protestants ignores the express statutory authority of the Department to evaluate the local public interests and to create permit conditions to protect those interests. Idaho Code § 42-203A(5) authorizes the Department to reject applications for permit that "conflict with the local public interest as defined in section 42-202B(3), Idaho Code" and to grant permits upon conditions. The *Preliminary Order* included significant analysis of the stream flows needed to provide habitat and passage for ESA-listed fish species. These topics fall within the definition of local public interest set forth in Idaho Code § 42-202B. Bird acknowledges that the local public interest review described in Idaho Code § 42-203A(5)(e) includes fish and wildlife habitat and aquatic life. *Bird Post-Hearing Brief* at 4. The hearing officer adopted permit conditions consistent with the requirements of Idaho Code § 42-203A(5). If Bird contends the permit conditions are unconstitutional, then Bird must also contend that the statute authorizing the Department to impose such conditions is also unconstitutional. This type of challenge must be raised before a court of competent jurisdiction. See IDAPA 37.01.01.415 ("hearing officer in a contested case has no authority to declare a statute unconstitutional").

Bird correctly notes that Chapter 15, Title 42, Idaho Code, describes a process where IWRB can obtain a minimum stream flow water right to provide for fish passage or fish habitat. It is surprising that IWRB has not sought additional minimum stream flow water rights in the Lemhi River basin, given the importance of adequate streamflow to the recovery of ESA-listed species. IWRB's failure to act on potential minimum stream flow water rights does not diminish the Department's authority to adopt permit conditions intended to address local public interest issues related to fish and wildlife habitat and aquatic life. Further, IWRB's participation as a protestant in the pending contested case does not diminish the Department authority to adopt permit conditions to address local public interest issues. The Department has the authority to require bypass flows to protect fish and wildlife habitat in all cases, whether or not IWRB is participating as a protestant. Bird's assertion that the local public interest conditions are unconstitutional and violate provisions of the Idaho Code is without merit and does not warrant any changes to the *Preliminary Order*.

Measuring Devices

The *Preliminary Order* included a permit condition requiring Bird to measure the flow in Big Timber Creek at two locations (the Upper BTC Gage site and the Lower BTC Gage site). Bird argues that the state and its water districts bear the sole responsibility to measure streamflow. This argument is without merit. The Department has the authority to include conditions on a permit to protect against injury to existing water rights and to address local public interest issues. This authority to condition permits naturally includes the authority to require a water user to measure streamflow to ensure compliance with other permit conditions. If a stream gage is used to benefit all water users in a district, it may be preferable for the gage to be installed and maintained by the water district. The stream gages described in the proposed permit would be used for the sole purpose of determining whether the proposed permit may be diverted. The stream gages are not needed to administer any of the other existing water rights in the water district. Therefore, the cost of constructing, maintaining and operating the stream gage should be borne by the permit holder.

Bird asserts that private water users are never required to maintain measuring devices in stream channels. This assertion is incorrect. Idaho Code § 42-702 states that any person constructing an on-stream reservoir may be required to install and maintain a stream gage upstream of the reservoir. Further, Idaho Code § 42-703 states: "It shall also be the duty of those using water in any district to place in the streams from which said water is diverted and at such places and intervals on said streams as the department of water resources may require suitable systems or devices for measuring the flow of water."

Bird argues that they cannot install and maintain measuring devices on property that they do not own. The Upper BTC Gage site is located on property owned by the U.S. Bureau of Land Management ("BLM"). The Lower BTC Gage site is located near the bridge for Highway 28, within a county road right-of-way. The hearing officer did not consider property ownership when evaluating the locations for Bird to measure Big Timber Creek. The hearing officer should reconsider the measurement sites and account for Bird's ability to access the measurement sites.

The Upper BTC Gage is not currently active. As noted in the *Agencies' Petition*, the record does not contain any information about who installed or maintained the Upper BTC Gage when it was in operation (2006-2016). It is unclear whether Bird would be able to obtain a right-of-way from the BLM to install a measuring device at that site.

Big Timber Creek flows through the Bird property near the proposed place of use. It would be possible to adjust the permit conditions to require stream measurement in Reach 5 (described in the USBR Study) at the Bird property, rather than at the Upper BTC Gage site. This would address the property ownership issue, and would also address Bird's concerns about the calculations associated with the existing water rights upstream of Reach 5. The *Preliminary Order* should be amended to require measurement of Big Timber Creek in Reach 5 on property owned by Bird. The measurement section should be located in the SESW of Section 8, T15N, R26E, upstream of the confluence with Little Timber Creek. The bypass flow at this location would be 54 cfs, consistent with the USBR Study.

The Lower BTC Gage is an active measurement site operated by Idaho Power Company in coordination with IWRB. This measurement site is located at the bridge for Highway 28, an area with a significant amount of public use and disturbance because of the highway. If Idaho Power Company were to discontinue its measurement activities at the Lower BTC Gage site, it is likely that Bird could continue stream measurement at that location. Therefore, the Lower BTC Gage will continue to be the designated site for the 18 cfs bypass flow in lower Big Timber Creek.

Bird argues that measurement site for the lower Big Timber Creek bypass should be the Whittaker flume, where the bypass flow for Whittaker's water right (74-15613) is measured. The Lower BTC Gage is located approximately ½ mile farther downstream than the Whittaker flume. Because of its downstream location, the Lower BTC Gage ensures that the bypass flows needed to optimize habitat for ESA-listed species exist throughout lower Big Timber Creek (designated as Reach 1 in the USBR Study). If the Whittaker flume were used as a measurement site, there is

a chance that the streamflow in Big Timber Creek would fall below the target bypass flow amounts before reaching the confluence with the Lemhi River.²

USBR Study

Bird argues that the 54 cfs required for adult fish passage through Reach 5 of Big Timber Creek is “suspect” and “unreliable.” Bird notes that the flow rate required for adult fish passage (54 cfs) is greater than the flow rate required for optimum spawning (42 cfs). Bird concludes that this is an illogical result and asserts that the 54 cfs fish passage requirement (which is significantly greater than the fish passage requirements in any other reach of Big Timber Creek) is a statistical outlier.

The USBR Study includes an explanation of how the adult fish passage requirements were calculated:

To determine the recommended flow for passage, shallow bars most critical to passage of adult fish were located, and a linear transect was measured which followed the shallowest course from bank to bank. For each transect, a flow was computed for conditions which met the minimum depth criteria in Table 10 [suggested passage criteria from the Oregon Department of Fish & Wildlife] where at least 25% of the total transect width and a continuous portion equaling at least 10% of its total width, equal to or greater than the minimum depth, was maintained.

Ex. 202 at 22 (citations omitted).

The flows required for adult fish passage in Reach 5 are not theoretical or speculative, but rather are based on actual measurements of the stream channel cross-section at the most shallow transect within the reach. The methods used to determine minimum flow for adult fish passage differ from the methods used to determine optimum flow for spawning. Fish passage flow was determined at a specific shallow transect within the reach. In contrast, optimum flow for spawning habitat was determined based on a composite of all transects within a reach. In other words, a flow of 42 cfs may provide optimum spawning habitat throughout most of Reach 5. A higher flow rate (54 cfs), however, is required to allow passage of adult fish through the shallowest cross-section of Reach 5. The technical information contained in the USBR Study is neither illogical nor unreliable.

In reference to bypass flows to protect fish passage and fish habitat for ESA-listed species, Bird argues “the Agencies did not submit any evidence in support of a minimum flow, let alone a minimum flow amount.” *Bird Petition* at 28. The Agencies offered the USBR Study

² Water right 74-15613 includes a condition requiring a bypass flow of 13 cfs “at all locations from the confluence of Little Timber Creek and Big Timber Creek down to the confluence of Big Timber Creek and the Lemhi River.” Therefore, even if there is 13 cfs at the Whittaker flume, if there is less than 13 cfs at the Lower BTC Gage, then the Whittaker water right (74-15613) should not be delivered. The best way to eliminate duplicate gages in lower Big Timber Creek and to ensure that the 13 cfs bypass flow described in water right 74-15613 is fully satisfied would be to measure the bypass flows for water right 74-15613 and the proposed permit at the Lower BTC Gage.

(Exhibit 202) into the administrative record without objection from Bird. Bird also proposed to offer the USBR Study into the administrative record but declined to do so to avoid duplication of exhibits. Bird did not offer technical information to refute the USBR Study. Bird did not identify any technical flaws in the USBR Study in their post-hearing brief and even proposed to accept a bypass flow of 13 cfs for lower Big Timber Creek, which is taken directly from the USBR Study (adult fish passage requirements for Reach 1). Bird's recently-discovered technical objections to the USBR Study are not convincing.

Channel-Altering Peak Flows

The *Preliminary Order* included the following condition ("Condition #10") on the approved permit: "The right holder shall cease diversion under this right whenever the flow at the Upper Big Timber Creek Gage is greater than 237 cfs." Bird argues that this condition is unconstitutional and does not comply with Idaho law. Bird also argues that this condition is not supported in the record and is not narrowly-tailored to address the local public interest in stream channel maintenance flows.

As noted above, the hearing officer is not persuaded by Bird's arguments that the local public interest conditions, including Condition #10 (which prevents the proposed permit from reducing peak, channel-altering flows on Big Timber Creek), violates any provisions of the Idaho Constitution or any provisions of Idaho law.

Bird argues that they have already been diverting the water described in the proposed permit for years and therefore should not be required to address local public interest concerns. *Bird Petition* at 22-23. Past use of water, authorized or unauthorized, does not insulate an applicant from the local public interest review under Idaho Code § 42-203A(5)(e). Just because an applicant has already been negatively impacting the local public interests for years should not result in an automatic pass to continue such impacts. Therefore, Bird's historic use of high water at the proposed place of use is of little consequence when conducting a local public interest analysis under Idaho Code § 42-203A(5)(e).

Bird also argues that "[t]here was no evidence placed in the record that the Big Timber Creek channel can even contain 237 cfs of water . . ." *Bird Petition* at 22. This is incorrect. As noted in the *Preliminary Order*, flow records for the Upper BTC Gage show that the flow in Big Timber Creek exceeded 237 cfs for 25 days during the snowmelt runoff period in 2009. Ex. IDWR 18.

Bird expresses frustration that the hearing officer "gave" the Agencies Condition #10, when the agencies did not even ask for it. *Bird Petition* at 19. The Department is not limited to adopting only those permit conditions requested by protestants. Nor is the Department limited to address only the issues raised by the protestants. The Department has an independent duty to review every application under the criteria set forth in Idaho Code § 42-203A(5), regardless of whether or not the application is protested.

The *Preliminary Order* included the following findings (§§ 20-22) related to Condition #10:

20. “Magnitude and timing of flows can influence instream and riparian habitat, and natural flow regimes are important in formation and maintenance of instream and floodplain habitats.” Ex. 198 at 4 (citations omitted). Periodic peak flows or high volume flows help “maintain the complexity of stream channels important for fish spawning, rearing, and survival by creating riffles and pools, depositional zones, and undercut banks.” *Id.* at 40.

21. “Spring runoff due to snowmelt that typically redistributes substrate, removes fine sediments, and creates pools and other complex habitats has not been available in the upper reaches of the Lemhi River due to early [irrigation] season water withdrawals.” Ex. 198 at 26, 39; Ex. 196 at 7; Ex. 203 at 86-88 (irrigation diversions during dry years can create an inverted hydrograph for the upper Lemhi River, where the lowest streamflow occurs during the runoff period). “As a result, the amount of off channel habitat for fish and the interchange of nutrients between aquatic and terrestrial/riparian environments has been significantly reduced.” *Id.*

22. High volume flow events occurring once every three to five years are sufficient to accomplish the stream channel maintenance functions required for optimum fish habitat. Diluccia Test. Based on regional streamflow regression equations, the unimpaired flow in Big Timber Creek, upstream of the major irrigation diversions, should exceed 237 cfs one year out of three years, on average. Ex. 202 at 11.

The record contains extensive evidence about the importance of peak flows for maintenance of the fish habitat functions of stream channels. The record also contains projected monthly exceedance flows for Big Timber Creek upstream of the major irrigation diversions. Ex. 202 (USBR Study) at 11. These flow exceedance estimates are based on regional streamflow regression equations developed by the USGS. *Id.* The record also contains actual streamflow data for Big Timber Creek at the Upper BTC Gage (upstream of the major irrigation diversions) from 2006 to 2016. Ex. IDWR 18.

The streamflow records for Big Timber Creek (2006-2016) can be used to confirm the reliability of the monthly exceedance values. According to the monthly exceedance flow table (Ex. 202 at 11), the peak flow on Big Timber Creek will be higher than 110 cfs eight years out of ten years, on average. Between 2006 and 2016, the peak flow on Big Timber Creek exceeded 110 cfs in all but one year (2013). According to the monthly exceedance flow table, the peak flow on Big Timber Creek will exceed 178 cfs one year out of two years (or half of the time), on average. Between 2006 and 2016, the peak flow on Big Timber Creek exceeded 178 cfs in five of the eleven years. According to the monthly exceedance flow table, the peak flow on Big Timber Creek will be higher than 284 cfs two years out of ten years on average. Between 2006 and 2016, the peak flow on Big Timber Creek exceeded 284 cfs in one year (2009).

Between 2006 and 2016, Big Timber Creek did not experience the high peaks or low peaks as frequently as predicted by the monthly exceedance flow table. This outcome, however, is not surprising. Monthly exceedance flows represent the long-term averages. One would not expect an eleven year period of stream flow records (which is a relatively short time period) to match the long-term exceedance flow values exactly. In general, however, the monthly exceedance flows are consistent with the actual stream flow records.

Bird's argument that Condition #10 is not supported by the record is without merit. Condition #10 is fully supported by the record. However, Bird's argument that Condition #10 is not narrowly-tailored to address the local public interest concerns has some merit. There are two ways in which Condition #10 is not narrowly-tailored to address the local public interest factors. First, the evidence in the record (testimony of Jeff Diluccia) is that peak flows must occur every three to five years to maintain the stream channel qualities for optimum fish habitat. Condition #10 was calculated based on a three-year recurrence interval. Evidence in the record is that peak flows occurring once every five years would also accomplish the stream channel maintenance objectives. Therefore, Condition #10 should have been based on the "Q.20" monthly exceedance flows (the flows expected to occur once every five years, on average). The 20% exceedance flows for Reach 7 of Big Timber Creek (upstream of the major irrigation diversions) is 284 cfs.

The second way Condition #10 is not narrowly-tailored to address the local public interest concerns is that it has no restriction on the number of days that the Bird permit could be curtailed for peak flows. Although it would be rare, it is possible to have a year where the flow in Big Timber Creek at the Upper BTC Gage exceeded 284 cfs for multiple weeks or months. In this type of a year, it would be unnecessary for the Bird permit to be curtailed for the entire period of high flow. Jeff Diluccia testified that the high flows occurring in 2009 were sufficient to restore the fish habitat characteristics of the Big Timber Creek stream channel. Based on streamflow records for the Upper BTC Gage, the flow in Big Timber Creek exceeded 284 cfs at the gage site for ten days in 2009. Coincidentally, Bird argues as an alternative, "if Condition No. 10 is going to remain as part of 74-16187 in some form, it should . . . [include] a 10 total day duration and provisions which provide that once the 10 total days are met in a calendar year, the provision is not in effect for the remainder of that year and for the next two years." *Bird Petition* at 24. A ten-day peak flow limit is supported by the record (Diluccia testimony, 2009 streamflow records for Upper BTC Gage) and, because Bird's other objections to Condition #10 fail, is acceptable to Bird.

Bird contends that once the peak flow threshold is exceeded in any given year (and the diversion under the proposed permit is suspended), Bird should not be subject to curtailment for peak flows for another two to four years. In other words, once peak flows occur, the stream channel is sufficiently maintained, and peak flows are not needed again for five years. This type of arrangement is not supported by evidence in the record. The 20% exceedance flow does not occur every five years, but rather occurs once every five years, on average. Therefore, it would not be appropriate to forgo a channel maintenance event in anticipation of a future peak flow that may not occur for more than five years.

On reconsideration, the hearing officer agrees that the permit condition related to channel maintenance (peak flows) was not narrowly-tailored to address the local public interest concerns.

The condition should be amended to be based on the five year peak flow and should include a ten-day limit for suspending diversion under the proposed permit.

Wild & Scenic Right

The *Preliminary Order* included a permit condition stating:

This right benefits from the subordination described in Paragraph 10(b)(6)(A)(ii) of water rights 75-13316 and 77-11941 and may only be diverted when the mean daily discharge at the Salmon River Shoup gage is greater than or equal to 1,280 cfs.

Bird argues that the proposed permit should receive subordination protection under Paragraph 10(b)(6)(A)(i) of the Wild & Scenic water rights. Water rights benefitting from subordination under Paragraph 10(b)(6)(A)(i) are not subject to the 1,280 cfs flow for Wild & Scenic use at the Shoup gage. In contrast, water rights benefitting from subordination under Paragraph 10(b)(6)(A)(ii) are not subject to call by the USFS Wild & Scenic water rights, but may only be diverted when the flow at the Shoup gage is greater than 1,280 cfs.

The condition related to the Wild & Scenic water rights is consistent with the evidence in the record. Based on the streamflow data for Big Timber Creek and the Salmon River, there is never a time when the proposed permit (as conditioned) would be available when flow at the Shoup gage is less than 1,280 cfs. The proposed permit would only be available during the snowmelt runoff period, when flow at the Shoup gage exceeds 1,280 cfs.

The Wild & Scenic water rights were discussed in great detail during the pre-hearing conference. The hearing officer encouraged all of the parties, including Bird, to investigate and compare the flows of the Salmon River to the flows in Big Timber Creek. Bird did not submit any technical analysis of Salmon River streamflow at the hearing. Therefore, there is no evidence in the administrative record supporting Bird's contention that the proposed permit needs subordination protection under Paragraph 10(b)(6)(A)(i). In fact, the evidence in the record is that Bird would not benefit in any way from subordination protection under Paragraph 10(b)(6)(A)(i). It is not consistent with the conservation of water resources within the State of Idaho for the Department to assign the limited amount of water under Paragraph 10(b)(6)(A)(i) to a water right that will not benefit from that type of subordination protection. The *Preliminary Order* should be amended to include a discussion about the Wild & Scenic rights within the conservation of water resources analysis.

Agencies' Petition

"The Agencies do not seek reconsideration of the core findings, analyses, or conclusions of the *Preliminary Order*." *Agencies' Petition* at 9. Instead, the Agencies argue that the *Preliminary Order* should be amended in certain areas to remove ambiguity about future administration of the permit. The issues raised by the Agencies are discussed below:

Upper BTC Gage

The *Preliminary Order* states that the IWRB maintained the Upper BTC Gage between 2006 and 2016. *Preliminary Order* at 7 (¶ 40) and 19. The Agencies correctly note that the record does not contain information about the ownership of or funding of the Upper BTC Gage. Proper identification of the owner or operator of the Upper BTC Gage is not needed to decide this contested case. Therefore, the sentences linking IWRB to the Upper BTC gage should be revised to better reflect the evidence in the record.

The Agencies request that the *Preliminary Order* be amended to require Bird to provide flow data at the Upper BTC Gage to the watermaster on a real-time basis. As noted above, Bird does not have access to the Upper BTC Gage site. The *Preliminary Order* included a number of calculations and adjustments to allow for measurement at the Upper BTC Gage site. Big Timber Creek flows through the Bird property through a portion of Reach 5 (described in the USBR Study), which is the reach immediately downstream of the proposed point of diversion. Requiring Bird to maintain a stream gage on his own property avoids the access issues at the Upper BTC Gage site and eliminates some of the calculations included in the *Preliminary Order*. The *Preliminary Order* should be amended to describe a stream gage on the Bird property instead of the Upper BTC Gage site. The stream gage constructed on the Bird property must allow for fish passage and should provide flow information for the watermaster on a real-time basis. In other words, the watermaster should be able to visit the site and quickly ascertain the flow in the creek without conducting an independent measurement.

Shoup Gage

The Agencies request that the *Preliminary Order* be amended to confirm that the stream flow data from the Shoup gage will be provided to the watermaster on a real-time basis. The Shoup gage is currently operated by the United States Geological Survey and streamflow data is available on a real-time basis. Based on the streamflow data in the record, it is highly unlikely that the permit will ever be available on Big Timber Creek when streamflow at the Shoup gage is less than 1,280 cfs. Therefore, streamflow data from the Shoup gage is less critical than the streamflow data from Big Timber Creek. The condition referring to the Shoup gage is sufficient as drafted.

Measurement Sections

The Agencies argue that the term “measurement sections” used in Condition 11 of the permit is ambiguous and request that the *Preliminary Order* be amended to eliminate the ambiguity. The Agencies argue that the stream gages described in the permit conditions should be “physical device[s] or structure[s] that can accurately measure stream flow.” *Agencies’ Petition* at 7. The Agencies also ask the hearing officer to amend the permit conditions to clarify that Bird bears the cost of “installing, operating, and maintaining any physical device or structure.” *Id.* The amendments proposed by the Agencies reflect the original intent of the hearing officer. The hearing officer is persuaded that the language of the permit conditions should be revised to address the concerns raised by the Agencies.

Administration at Field Headgate

The Agencies ask the hearing officer to include language in the *Preliminary Order* requiring permit conditions 8, 9, 10 and 12 to be administered at the field headgate. *Agencies' Petition* at 4-5. According to the Agencies, "It is not possible for the watermaster to administer Conditions 8, 9, 10, and 12, or ensure compliance with them, solely by measuring and regulating the point of diversion on Big Timber Creek." *Id.* The Agencies propose an additional condition requiring Bird to install a lockable isolation valve at the field headgate to be administered by the watermaster. *Id.*

Idaho Code § 42-607 sets forth the duties of a watermaster. A watermaster's primary duty is to distribute the available water supply on a stream to authorized points of diversion according to the priority dates of the various water rights on the stream. Issues related to beneficial use and unauthorized acres fall within the Department's enforcement authority (described in Idaho Code § 42-351). Occasionally, the Department may rely on a watermaster to collect information related to enforcement actions. However, the Department should not extend a watermaster's routine duties to issues and devices separate from the stream channel.

Reconnect Flows

The Agencies argue that the water associated with current or future reconnect projects on Big Timber Creek should not be credited toward the 18 cfs bypass flow for lower Big Timber Creek. *Agencies' Petition* at 5-6. The 18 cfs bypass flow was added to the permit to satisfy the local public interest in maintaining optimum fish habitat and fish passage in lower Big Timber Creek. The local public interest concerns are addressed whenever there is 18 cfs of flow in lower Big Timber Creek, regardless of the purpose for or motives behind the flow. Requiring an 18 cfs bypass flow above and beyond the flows associated IWRB's reconnect projects is not supported by the technical evidence in the administrative record. No change is warranted on this point.

Relationship to ESA Enforcement

The Agencies assert that it is important to clarify that the *Preliminary Order* does not make any substantive ESA determinations that will govern recovery of the ESA-listed fish species or provide protection to water users under the ESA. *Agencies' Petition* at 8-9. The Agencies are correct. The *Preliminary Order* is not intended to be a recovery plan and does not provide protection from enforcement under the ESA. The hearing officer is persuaded that language should be added to the *Preliminary Order* explaining these limitations.

Upper Lemhi River - PHABSIM

The Agencies request that the hearing officer remove a sentence ("The same would be true for the upper Lemhi River.") from the *Preliminary Order*. According to the Agencies, the sentence lacks support in the record. Upon reconsideration, the hearing officer agrees that the sentence is not clear and contains an ambiguous reference. The language should be revised to better reflect the intent of the hearing officer.

ORDER

IT IS HEREBY ORDERED that the *Bird Petition* and *Agencies' Petition* are GRANTED, IN PART. The arguments warranting changes to the *Preliminary Order* are identified above. All other arguments raised or changes proposed in the petitions, if not addressed in this order or reflected in the *Amended Preliminary Order*, are DENIED.

Dated this 6th day of February, 2020.



James Cefalo
Hearing Officer

CERTIFICATE OF MAILING

I hereby certify that on the 6th day of February 2020, I mailed a true and correct copy of the foregoing ORDER GRANTING PETITIONS, IN PART, with the United States Postal Service, certified mail with return receipt requested, postage prepaid and properly addressed to the person(s) listed below:

US MAIL - CERTIFIED

RE: APPLICATION FOR PERMIT 74-16187

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